



August 4, 2017

via email

Co-Hearing Officer Tam Doduc  
Co-Hearing Officer Felicia Marcus  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814

**Re: Appropriate procedure for noticing and adopting  
the Board’s proposed “appropriate Delta flow criteria”  
under Water Code section 85086**

Deirdre Des Jardins, Principal at California Water Research (“California Water Research”), sent a letter to the Hearing Officers on May 3, 2017, requesting more information on the Board’s planned procedure for considering testimony and evidence in the hearing on the “appropriate Delta flow criteria” pursuant to Water Code 85086, subdivision (c)(2.) There was no response.

While the statutory requirements in Division 2, Part 2, Chapter 10 of the Water Code for notice and consideration of a change petition are clear (Wat. Code § 1700 et. seq.), the statutory requirements for notice and consideration of the Board’s proposed “appropriate Delta flow criteria” have been unclear. During the pre-hearing phase, the San Joaquin Tributaries Association (“SJTA”) and other parties argued that a separate proceeding should be held to determine the “appropriate Delta flow criteria,” similar to the Bay-Delta Water Quality Plan update proceedings. The Board ruled in the March 4, 2016 hearing ruling that a separate proceeding was not required, and that holding a separate hearing would be inefficient:

Finally, we disagree with the argument advanced by SJTA and other parties that the State Water Board should hold a separate proceeding to develop “appropriate Delta flow criteria” for inclusion in any order approving the change petition. The Delta Reform Act does not require the State Water Board to hold a separate proceeding to develop “appropriate Delta flow criteria,” and holding a separate proceeding on this issue would

be inefficient. (p. 5.)

The Board did not indicate when the information on appropriate Delta flow criteria would be available, but stated that it would be considered during Part 2 of the hearing.

SJTA also asserted that it is unclear when this issue will be addressed during this proceeding, and requested an opportunity to submit a briefing on the issue. As set forth in the hearing notice, what constitutes “appropriate Delta flow criteria” is key hearing issue number 3.d., which will be considered during Part 2 of the hearing. We anticipate holding a second pre-hearing conference before beginning Part 2 of the hearing, and will consider whether to permit opening or closing briefs on Part 2 hearing issues at that time. (p. 5, underlining added.)

As explained below, there are outstanding procedural issues regarding “appropriate Delta flow criteria,” which were not addressed by the Hearing Officers’ ruling of July 27, 2017:

DWR has indicated that the final Environmental Impact Report/Environmental Impact Statement for the project and the Biological Opinions will be submitted in Part 2 of the hearing. In addition, we anticipate that other information concerning appropriate Delta flow criteria or other measures to protect fish and wildlife will be submitted in Part 2. (p. 2.)

California Water Research hereby requests that the Board hold a pre-hearing conference prior to Part 2 of the hearing. An intent to hold such a pre-hearing conference was indicated in the Hearing Officer’s March 4, 2016 hearing.

Also, as explained below, there appear to be noticing requirements for the “appropriate Delta flow criteria,” that the Board was unaware of at the time the October 15, 2015 WaterFix Change Petition Hearing Notice was issued. Further research has uncovered the fact that while the legislature exempted the Board’s regulatory actions under the Porter-Cologne Water Quality Act (Wat. Code Division 7, § 13000 et. seq.) from the Administrative Procedure Act (Govt. Code § 11340 et. seq.), there is no such exemption for regulatory actions under the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code Division 35, Part 2, § 85080 et. seq.)

California Water Research hereby provides information to the Board on the applicability of Administrative Procedure Act to the Board’s decision on “appropriate Delta Flow criteria,” that it may be considered by the Hearing Team prior to noticing Part 2 of the hearing. California Water Research also hereby requests that the Board provide notice of the Board’s own proposed “appropriate Delta Flow criteria,” and supporting technical and scientific information, 45 days prior to the part of the WaterFix hearing considering adoption of that criteria, as required under the Administrative Procedure Act (“APA.”)

## **Delta Reform Act on instream flow criteria**

Whether adopting the “appropriate Delta flow criteria” will be a regulatory act is determined partly by the context of the Sacramento San-Joaquin Delta Reform Act of 2009 (“Delta Reform Act.”), Division 35, Part 2 of the Water Code. Water Code section 85086, subdivision (b) states:

It is the intent of the Legislature to establish an accelerated process to determine instream flow needs of the Delta for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan. (emphasis added)

Subdivision (c)(1) states:

For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions.

The 2009 notice for the Board’s informational proceeding pursuant to subdivision (c)(1) referred to the existing regulatory requirements governing Delta flows<sup>1</sup>:

While this proceeding does not alter the current regulatory requirements governing the Delta, SB 1 specifies that the State Water Board shall review existing water quality objectives in developing the flow criteria. Existing flow related objectives contained in the 2006 Bay-Delta Plan include the following: Delta Outflow, Sacramento River Flow, and San Joaquin River Flow objectives for the protection of fish and wildlife; salinity objectives for municipal, agricultural, and fish and wildlife protection; Export Limits and other operational requirements for the protection of fish and wildlife; and Dissolved Oxygen and Salmon Protection<sup>4</sup> (salmon doubling) objectives for the protection of fish and wildlife. Through their implementation in Revised State Water Board Decision 1641 (dated March 15, 2000) (D-1641), many of these objectives control Delta outflows to some extent depending on the time of year. (p. 5.)

Thus the Board recognized that “appropriate Delta flow criteria” are regulatory and an extension of the flow related objectives in the Bay-Delta Water Quality Control Plan.

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<sup>1</sup> State Water Resources Control Board, Notice of Public Informational Proceeding and Pre-Proceeding Conference to Develop Flow Criteria for the Delta Ecosystem Necessary to Protect Public Trust Resources, December 16, 2009. Available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/deltaflow/docs/notice121609.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/notice121609.pdf). Accessed on August 3, 2017.

Water Code section 85086 subdivision (c)(2) states:

Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section....

Water Code section 85087 also provided for other instream flow studies:

The board, by December 31, 2010, shall submit to the Legislature a prioritized schedule and estimate of costs to complete instream flow studies for the Delta and for high priority rivers and streams in the Delta watershed, not otherwise covered by Section 85086, by 2012, and for all major rivers and streams outside the Sacramento River watershed by 2018.

The Board's report submitted pursuant to Water Code section 85087<sup>2</sup> stated:

Streamflow objectives can be set administratively either as part of the State Water Board's planning processes, which would then require subsequent implementation actions, or directly as the result of a regulatory water rights action taken to amend specific water right permits and licenses. In either case, the activity would require compliance with: (1) the California Environmental Quality Act (CEQA), (2) the Water Code, and (3) the Administrative Procedures Act, as well as other regulatory requirements. (p. 5, emphasis added.)

To summarize, the Delta Reform Act mandated a process of setting flow criteria for the Delta and a schedule for flow studies of high priority rivers and streams in the Delta watershed. The Board also recognized that setting Delta and instream flow criteria is a regulatory action, and that setting instream flow criteria by amending specific water right permits requires compliance with the Administrative Procedures Act. Also, as will be explained later in this letter, the hearings on Decision 1485 and Decision 1641 previously recognized that amending the SWP and CVP permits to include flow objectives in the Delta is regulatory.

### **Change Petition notice and objection relating to Wat. Code § 85086**

The October 15, 2015 Change Petition Hearing Notice did not provide details of the "appropriate Delta Flow criteria" that would be considered for adoption in the hearing, but did

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<sup>2</sup> State Water Resources Control Board, Instream Flow Studies for the Protection of Public Trust Resources: A Prioritized Schedule and Estimate of Costs, Submitted In Accordance with the Requirements of Water Code Section 85087, December 2010. Available at [http://www.waterboards.ca.gov/publications\\_forms/publications/legislative/docs/2011/instream\\_flow2010.pdf](http://www.waterboards.ca.gov/publications_forms/publications/legislative/docs/2011/instream_flow2010.pdf). Accessed on August 3, 2017.

provide details of the Board’s process for adopting the “appropriate Delta Flow criteria” in the context of the Board’s water quality processes (“Bay-Delta Planning and Implementation Processes” (p. 6).) The Board explicitly recognized that some information from the Phase 2 Update of the Bay-Delta Water Quality Control Plan would be required for the “appropriate Delta flow criteria.” The October 15, 2015 Hearing Notice stated:

.. To inform what appropriate flow criteria should be included in any approval of the Petition, however, State Water Board staff intends to submit the draft Phase 2 Scientific Basis Report into the record for this hearing. The Scientific Basis Report is intended to support the Phase 2 Update of the Bay-Delta Plan by documenting the science underlying potential modifications to the 2006 Bay-Delta Plan and providing a potential range of alternatives that will be examined in the associated environmental document. (p. 7.)

In the submitted WaterFix Change Petition application, the Petitioners proposed to provide information required under section 85086 as part of “subsequent filings and appearances”:

Petitioners will file a final Environmental Impact Report/Environmental Impact Statement with the State Water Board during the course of the public hearing for this Petition. Subsequent filings and appearances before the State Water Board will fully support approval of the request contained in this Petition and demonstrate satisfaction of California Water Code section 85086. (Exhibit SWRCB-1, p. 11 of pdf.)

A motion to dismiss the petition was filed by the San Joaquin Tributaries Authority (“SJTA”) on April 20, 2016 on the basis that the October 15, 2015 Hearing Notice did not include a legally sufficient proposal for “appropriate Delta flow criteria.” The April 25, 2016 hearing ruling summarized the filing:

...SJTA argued that the “appropriate Delta flow criteria” will impact project operations, which could in turn result in impacts to other legal users of water. Accordingly, SJTA argued that the State Water Board should dismiss the petition, order the petitioners to supplement the petition, or hold an independent and preliminary hearing on the issue of “appropriate Delta flow criteria” before proceeding with Part 1 of the hearing. SJTA presented a number of arguments in support of its contention that the Delta flow criteria described in the petition are deficient. (p. 2.)

In the April 25, 2016 hearing ruling, the Hearing Officers also ruled that they expected the Petitioners would describe what Delta flow criteria “they believe would be appropriate” as part of their case in chief:

Although ultimately the State Water Board will decide what Delta flow criteria are appropriate in any approval of the petition, we expect the petitioners to describe, as part of their case in chief, what Delta flow criteria they believe would be appropriate.

(p. 3, emphasis added.)

No testimony on appropriate Delta Flow criteria was provided as part of Petitioners' case in chief, although Petitioners' witness, Jennifer Pierre, testified that the Department of Water Resources was continuing to work with the Board during Part 1 of the Hearing to further develop the Board's preferred alternative. (R.T. July 29, 2016, 77:2:22.) With the Hearing Officer's July 26, 2017 ruling that "we anticipate that other information concerning appropriate Delta flow criteria or other measures to protect fish and wildlife will be submitted in Part 2," there is now no deadline for providing this information in the hearing.

### **Prior OAL decision on applicability of APA requirements**

When the Board does issue an order setting appropriate Delta flow criteria, the criteria will interpret Water Code section 85086, subdivision (c) (2.) Thus, it will not only be a water right decision, it will be a regulation under the definition in Government Code section 11342.600:

Regulation means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. (underlining added.)

For a regulation interpreting a statute, the Administrative Procedure Act requires notice of the proposed regulation pursuant to Government Code section 11346.4, subdivision (a.) The Office of Administrative Law ruled on January 22, 1990 that the APA applies to rulemaking proceedings by the State Water Resources Control Board<sup>3</sup>:

The APA generally applies to all state agencies, except those in the judicial or legislative departments. Since neither the State Board nor the Regional Board is in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to both Boards.

In addition, Title 23, California Code of Regulations, section 649, subsection (a) and

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<sup>3</sup> California Office of Administrative Law, 1990 Determination No. 1, In Re: Request for Regulatory Determination filed by J. H. Baxter & Company regarding standards used by the State Water Resources Control Board and the Regional Water Quality Control Board, North coast Region, in administering the "Toxic its Cleanup Act," January 22, 1990. Available at [https://www.oal.ca.gov/wp-content/uploads/sites/28/2017/05/1990\\_OAL\\_Determination\\_No.1.pdf](https://www.oal.ca.gov/wp-content/uploads/sites/28/2017/05/1990_OAL_Determination_No.1.pdf) Accessed on August 3, 2017. Submitted for Official Notice.

section 649.1, concerning rulemaking proceedings by the State and Regional Boards, specifically require "regulations" to be adopted pursuant to the APA:

§ 649. Scope.

(a) 'Rulemaking proceedings' shall include any hearings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards.

[Emphasis added.]

§ 649.1. Rulemaking Proceedings.

"Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter." [Emphasis added.]

(p. 9.)

### **No applicable exemption to APA requirements**

Government Code 11346, subdivision (a), provides that “[t]his chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” The Delta Reform Act did not contain an exemption to the Administrative Procedure Act, and as explained below, other exemptions do not apply to the instream flow criteria required by the Delta Reform Act.

In 1994, the legislature specifically exempted Water Quality Control policies, plans and guidelines from APA requirements, but provided that the Board should submit the policies, plans, and guidelines to the Office of Administrative law. Government Code section 115353 subdivisions (a) and (b)(1) provide as follows:

(a) Except as provided in subdivision (b), this chapter does not apply to the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with Section 13000) of the Water Code.

(b) (1) Any policy, plan, or guideline, or any revision thereof, that the State Water Resources Control Board has adopted or that a court determines is subject to this part, after June 1, 1992, shall be submitted to the office.

However, the exemption in Government Code section 11353 only applies to water quality control plans and guidelines pursuant to the Porter-Cologne Water Quality Control Act, Division 7 (commencing with Section 13000) of the Water Code. The “appropriate Delta Flow criteria” will be adopted pursuant to the Delta Reform Act, Division 35, Part 2 of the Water Code

(Section 85080 et. seq.), a completely different division.

It appears that the only other potentially applicable exemption is Government Code section 11340.9, subdivision (i), which provides that: "This chapter does not apply to ... A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." However, courts have held that for an administrative decision to be "of general application," it need not apply to all citizens of the state. In *Morales v. California Department of Corrections and Rehabilitation*, 168 Cal. App. 4th 729, 739 (2008), the court held that a lethal injection protocol at San Quentin was a "Rule of General Application" that was "subject to the APA, even if it did not apply to all inmates, or even to all inmates sentenced to death" and enjoined execution of an inmate until the protocol was adopted pursuant to the APA.

The State Water Project and Central Valley Project are also not individual persons, but massive, coordinated water projects with operations that affect most of California's Central Valley as well as the Sacramento-San Joaquin Delta. The projects also provide water supplies for a large portion of the state. The October 15, 2016 WaterFix Change Petition Hearing Notice has a footnote which states:

The counties that could be affected by the Petition are: Alameda, Butte, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Imperial, Kern, Kings, Los Angeles, Madera, Merced, Napa, Orange, Placer, Riverside, Sacramento, San Benito, San Bernardino, San Diego, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Shasta, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Ventura, Yolo, and Yuba. These are the counties in which the Department of Water Resources and U.S. Bureau of Reclamation operate the State Water Project and federal Central Valley Project, respectively. The stream systems that could be affected by the Petition are Sacramento River upstream of the Sacramento-San Joaquin Delta and downstream of Shasta Dam, Trinity River downstream of Lewiston Dam, Clear Creek downstream of Whiskeytown Dam, Feather River downstream of Oroville Dam, American River downstream of Folsom Dam, Old River tributary to San Joaquin River, and Sacramento-San Joaquin Delta Channels tributary to Suisun Bay. (p. 1.)

The Petitioners themselves have stated that the "appropriate Delta flow" criteria could affect operations of the entire State Water Project and Central Valley Project, including upstream reservoir storage. (See, for example, the Revised Draft BDCP EIR/EIS, Exhibit SWRCB-4, (p.3A-67 at 48) and (p. 3I-9 at 7.)

In *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal. App. 4th 698, the court made clear that, in reviewing actions for compliance with the APA, the OAL should focus on the content of the challenged agency rule, not the label placed on the rule by the agency:

... the relevant Government Code sections are careful to provide OAL authority over

regulatory measures whether or not they are designated “regulations” by the relevant agency. In other words, if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. In light of this strong legislative mandate, concededly regulatory agency directives—such as the amendments to the water quality control plan at issue here—must be deemed regulations. (*Id* at 702.)

The “appropriate Delta flow criteria” are required to “include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions” (Wat. Code 85086(c)(1)), and so will “look like a regulation, read like a regulation, and act like a regulation.”

### **Context of previous amendments to SWP and CVP permits**

The adoption by the Board of flow-related criteria governing the operations of the State Water Project and Central Valley Project should also be considered in the context of the Board’s previous decisions amending the permits of the projects. In these proceedings, the Board explicitly recognized that the decisions involved both the Board’s quasi-judicial and quasi-legislative functions. Water Right Decision 1485 stated,

The present proceeding is a consolidated hearing pursuant to both water quality control and water right authority of the Board. As a result of the proceeding, the Board not only is amending terms and conditions for the subject permits of the Department and Bureau, but also is adopting a water quality control plan (Delta Plan) containing water quality standards for the protection of beneficial uses of the waters of the Sacramento-San Joaquin Delta and Suisun Marsh. (Exhibit SWRCB-23, p. 5.)

Water Right Decision 1641, approving the application by the Department of Water Resources and the Bureau of Reclamation for a Joint Point of Diversion for the SWP and CVP, stated:

This decision is part of the SWRCB’s implementation of the 1995 Bay-Delta Plan. Many of the objectives in the 1995 Bay-Delta Plan are best implemented by making changes in the flow of water or in the operation of facilities that move water. Accordingly, this decision amends certain water rights by assigning responsibilities to the persons or entities holding those rights to help meet the objectives. (Exhibit SWRCB-21, p. 5.)

The Board has referred to the standards set in Decision 1485, and later Decision 1641, in subsequent actions and decisions regarding operations of the State Water Project and Central Valley Project, and impacts of the projects on water quality and aquatic species. The standards have also been referred to in the federal Biological Opinions under the Endangered Species Act, and the section 2081 Incidental Take Permit recently issued by the California Department of Fish and Wildlife. Thus while “interpretations that arise in the course of case-specific adjudication are not regulations,” *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 the

“appropriate Delta Flow criteria” adopted under any decision approving the WaterFix Change Petition will be of broad future application, similar to criteria adopted as part of Decision 1485, and later Decision 1641. The court held in *Cal. Ass’n of Med. Prods. Suppliers v. Maxwell-Jolly* (2011) 199 Cal. App. 4th at 302 “An administrative action is quasi-legislative when the administrative agency is creating a new rule for future application.”

The Board also recognized in the Hearing Notice that setting appropriate Delta flow criteria in the permit terms for the State Water Project and Central Valley Project is related to the Board’s public trust actions in the Board’s update of the Bay-Delta Water Quality Control Plan.

Finally, in *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 438, the court ruled that “Further, because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (citation omitted) we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.”

### **Conclusion**

Thus the WaterFix Change Petition hearing is not just a hearing on the Change Petition application, but also a proceeding to set “appropriate Delta Flow criteria” as conditions of the SWP and CVP permits. This will be an interpretation of Water Code section 85086 subdivision (c)(2), and so a quasi-legislative action.

The APA Act then requires that, 45 days prior to the part of the WaterFix change petition hearing on adopting the proposed Delta flow criteria, the Board notice not only the complete text of the proposed flow criteria, but also a statement of reasons for the criteria, as well as identifying the studies and other evidence supporting it (Govt. Code § 11346.2.) “The APA applies to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted” unless expressly exempted. *Tidewater* 14 Cal. 4th at 570 (emphasis original) (quotation marks and citation omitted.) In the interest of hearing efficiency, it would be appropriate to do this prior to Part 2 of the hearing.

California Water Research thanks the Board for their consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a stylized flourish at the end.

Deirdre Des Jardins  
Principal, California Water Research

cc: WaterFix hearing parties